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ABSTRACT

Given the emergence of challenges that are increasingly global in nature, and given the irreducible contingency of state borders, it would seem that justice must become global justice: justice that takes shape through a legal order that holds for all of humanity and everywhere. But is justice for all and everywhere possible? At issue, in this question, is not a rearguard defense of the state and state law. Instead, the question concerns the globality of global law and global justice. Is any legal order possible, global or otherwise, that organizes itself as an inside without an outside, that is, which is all-inclusive? A prima facie candidate for such an order is the Rome Statute, which established the International Criminal Court to investigate and prosecute genocide, crimes against humanity, war crimes, and the crime of aggression. Yet careful consideration of the scope of the Rome Statute shows that it cannot realize global justice as criminal justice without excluding other forms of justice, for example restorative justice, thereby both recognizing and misrecognizing the victims of the crimes the International Criminal Court is called on to investigate and prosecute. Humanity is inside and outside the Rome Statute's invocation of 'the international community as a whole.' Because it organizes itself as an inside vis-à-vis an outside, the Rome Statute, like all global law and justice, is local law and justice. If, as this article argues, the inside/outside contrast is constitutive for any

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imaginable legal order, it also draws on the asymmetries of processes of collective recognition to articulate a concept of global justice that is neither universalist nor particularist, neither all-encompassing nor relativistic.

INTRODUCTION

Whatever else it might mean, the expression "global law" connotes a legal order that claims, or aspires to claim, global validity for itself. And assuming that a claim to validity entails the aspiration to realizing justice, global legal orders are oriented to bringing about global justice, even if they forever fall short of the mark in this endeavor. In turn, if justice amounts to "rendering to each their own"—*suum cuique tribuere*, in Ulpian's memorable formulation—or, in another hoary formulation, to "treat the equal equally and the unequal unequally," then global legal orders aspire to realize this injunction across the whole face of the earth. It would seem that global justice is justice for all, justice *era omnes*, and justice everywhere, justice *erga loci*, as one might put it. By dint of being justice for all and everywhere on earth, global justice seems to break with the two key limitations of justice available to state law, the validity of which is, in principle, territorially circumscribed. States aspire primarily, if not solely, to realize justice for those individuals and groups located in their territory, that is, to those who are somewhere rather than everywhere. As the champions of global justice insistently point out, the contingent borders of states continuously undercut the possibility of realizing justice beyond states.[1] For why should justice be limited to those inside a territory and withheld from those outside? Why should the contingent fact that I am a citizen of state X render me entitled to demand from the state legal order that I be rendered what is my own, in contrast to noncitizens who may be affected by the actions of the state, yet are located outside of its territory? A similar question arises if one looks at the second of the aforementioned formulations of the principle of justice. Can it be the expression of justice to treat citizens as equals and noncitizens as unequal, in light of the more fundamental equality afforded by our common humanity?

Given the irreducible contingency of state borders and the emergence of challenges that are global in nature, it would seem that justice must become global justice: justice that is unlimited by dint of

1. NANCY FRASER, SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD 12 (2009); *see also* Stefan Gosepath, *The Global Scope of Justice*, *in* GLOBAL JUSTICE 145–168 (Thomas Pogge ed., 2001); Peter Singer, ONE WORLD: THE ETHICS OF GLOBALIZATION (2002).

holding for all and everywhere. And, on the face of it, the emergence of global legal orders is a precondition for the possibility of realizing global justice, even if a range of emergent global legal orders, such as the World Trade Organization (WTO), fall well short of realizing justice. Only a legal order that has an inside but no outside, which would include without excluding, can be truly and properly just. This is another way of saying that the aspiration to realize an all-inclusive legal order is what global justice is about.

But is justice for all and everywhere possible? By raising this question, I am not clearing the ground for a rearguard defense of the state and state law, even though there are excellent reasons to believe that the state will remain a key—probably the principal—form of political organization in a global era. Instead, my question concerns the globality of global law and global justice. More specifically, my question is twofold. Is any legal order possible, global or otherwise, that does not organize itself as an inside vis-à-vis an outside? If, as I will argue, the inside/outside contrast is constitutive for any imaginable legal order, in what sense can we still hold on to the notion of global justice?

I. BORDERS AND LIMITS

Both universalist and particularist readings of justice share a common assumption, however bitterly they may disagree on just about everything else. Whether one endorses global justice as justice for all and everywhere, or justice for those within a territorially bounded political collective, one takes for granted that the inside/outside distinction is equivalent to the distinction between the domestic and the foreign. For example, and trivially, citizens, as well as policy makers and other officials, are accustomed to refer to the internal and external affairs of states. In the same vein, the legal doctrine refers to territorial and extraterritorial jurisdiction, where the latter concerns those relatively exceptional situations in which jurisdiction is exercised outside of a state's territory. The defenders of global justice will point out that globalization processes signal the crisis of the territoriality principle—that we have now entered an era of "justice beyond borders," and hence an era in which it can no longer be taken for granted that the distinction between inside and outside is a necessary precondition for justice.[2] The defenders of state justice, to the contrary, will argue that:

2. "This book examines the following question: 'What principles, if any, should govern the global realm?' Until recently, much, if not indeed most, political philosophy focused purely on how a state should treat its own citizens. It dwelt almost exclusively, that is, on what might be called domestic political theory." SIMON CANEY, JUSTICE BEYOND BORDERS 1 (2005).

> [t]he idea of distributive justice presupposes a bounded world within which distribution takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves. That world . . . is the political community . . . .[3]

The universalist denies that the borders of a state condition the possibility of justice; the particularist affirms that they do. But whether they rue or laud territorial borders, both positions take for granted and entrench the assumption that the inside/outside distinction arises with the spatial closure that gives rise to the contrast between the domestic and the foreign.

There is, however, a second manifestation of the inside/outside distinction that escapes the purview of both theories of justice: the distinction between own and strange places. This distinction is more fundamental than the distinction between the domestic and the foreign, as it is common to both state law and global law. To show why, let me begin with state law, evoking Michel Foucault's discussion of what he calls "heterotopias."[4] In contrast to utopias, which connote a society that is perfect, hence nowhere, a heterotopia is:

> a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted. Places of this kind are outside of all places, even though it may be possible to indicate their location in reality.[5]

Foucault subsequently offers a taxonomy of heterotopias, secerning "heterotopias of crisis" and "heterotopias of deviation."[6] The former relate to places that mark the passage from one phase in life to another, such as the honeymoon hotel; the latter refer to places for deviant forms of behavior, such as the psychiatric hospital or the prison.[7] From a legal point of view, a prison is indeed a place for deviant behavior. But it is the deviancy proper to criminal behavior, hence to illegality. While a prison may be a heterotopia, an "other" legal place, it is not, of itself, a

3. MICHAEL WALZER, SPHERES OF JUSTICE 31 (1983).

4. Michel Foucault, *Des Espaces Autres. Hétérotopies* [*Of Other Spaces, Heterotopias*], 5 ARCHITECTURE, MOUVEMENT, CONTINUITE 46 (1984), https://foucault.info/doc/documents/heterotopia/foucault-heterotopia-en-html (last visited Mar. 27, 2018).

5. *Id.*

6. *Id.*

7. *Id.*

strange place. To the contrary, state legal orders anticipate the possibility of criminal behavior and allot it a place within the arrangement of legal places that constitutes a territory in the form of prisons. Criminal justice is a particular instance of the general injunction of assigning to each their own place (i.e., imprisonment). Again, criminal justice, like all forms of justice, demands treating the equal equally and the unequal unequally, assigning different places to the criminal and the innocent.

Yet, the Marion Federal Penitentiary in Illinois became a strange place—a *xenotopia*, as I will call it—in the course of work stoppages in 1972 by the Political Prisoners Liberation Front (PPLF) to "challenge the very logic of incarceration as a form of permanent living death."[8] Inmates who normally worked in the metal furniture plant, print plant, kitchen, and hospital stayed in their cells. The work stoppages were part of a broader and concerted set of actions between the inmates, and between them and sympathizers in the outside world, that included "radical educational projects, the work of writ writers, clandestine self-defense classes and organized strikes," together with legal action and political mobilization of the public, both national and international.[9] Resistance by the inmates "challenged the technologies of control and coercion [deployed by Marion] and constituted political struggles against the logic and function of incarceration as a means to destroy the civil and political lives of America's subordinated populations."[10] Spatially speaking, their resistance endeavored to create a new web of interconnected places, a new world alternative to the web of interconnected places to which the Marion Federal Penitentiary belonged. In this way, the "prison rebellion years," as they came to be called, highlight one of the main findings of Lisa Guenther's critical phenomenology of solitary confinement, as brilliant as it is devastating, about the relationality of lived space that is rooted in human beings "intercorporeality."[11]

It is not difficult to multiply the examples; it may suffice to refer to Zuccotti Park in Manhattan, which became xenotopic when taken over by the Occupy Wall Street movement in 2006, or the *Movimiento de Trabajadores Desocupados* or Unemployed Workers Movement (MTD),

8. Alan Eladio Gómez, *Resisting Living Death at Marion Federal Penitentiary, 1972*, 96 RADICAL HIST. REV. 58, 58 (2006).

9. *Id.* at 65.

10. *Id.*

11. Guenther formulates the leading question of her inquiry as follows: "What happens when an intercorporeal being such as [a human being] is confined for a prolonged period of time to a small, enclosed space, isolated from other living beings and from an open-ended relation to the world? What are the ethical, political, and even ontological implications of such confinement?" LISA GUENTHER, SOLITARY CONFINEMENT 123 (2013).

which emerged in the wake of the financial crisis that buffeted Argentina in 2001 and blocked roads leading to poor neighborhoods at the outskirts of cities (*piquetes*). Participants "talk about the *piquete* as not only being a space of protest, but of what opens up when the road is shut down. Movement participants sometimes refer to this as 'free territory.'"[12] Indeed, the flip side of moving to block roads of access to the neighborhoods was to create "autonomous areas upon which [the *piqueteros*] have built housing and gardens, raised livestock, created alternative education and healthcare, among many other subsistence projects."[13]

These examples allow me to clarify how I propose to disambiguate the distinction between inside and outside. In each case, a form of behavior registers in the corresponding state legal order as either legal or illegal, hence as emplaced or misplaced. All three forms of behavior are *inside* a legal order, in the sense that they literally take place within what, from the perspective of the corresponding state collective, counts as *our own* territory. Their behavior is illegal, that is, misplaced. Yet, the behavior of the prison strikers and of the Occupy and MTD movements is also *outside* these state territories: it intimates a way of organizing the territory of a collective that calls into question how the state posits (il)legality, hence (mis)placement. Their behavior is not only emplaced or misplaced; it is also *displaced*, evoking another distribution of ought-places, meaning by such a different arrangement of places in which behavior is commanded, prohibited, or allowed. More precisely, it speaks to a strange distribution of ought-places, that is, to a distribution of places that conflicts with and resists integration into how a given state differentiates and joins together a manifold of ought-places into a single territory. Their behavior is not just legal or illegal; it is *a-legal*, where the "a" of a-legality refers to a way of distinguishing between legal and illegal behavior that contests how this distinction is drawn by a given legal order.[14]

In short, a-legal behavior speaks to another spatial configuration of justice, another way of establishing what counts, in the law, as to each their own . . . place. The PPLF, the Occupy Wall Street movement, and the *piqueteros* all assert that justice is not to be found here, in the territory of the respective states. Justice is somewhere, yes, but somewhere else. They claim that realizing justice requires transgressing the boundaries of these ought-places and striving to configure a territory otherwise as another interconnected distribution of ought-places. By transgressing the boundaries of the prison, the square, and

12. MARINA SITRIN & DARIO AZZELLINI, THEY CAN'T REPRESENT US! 186 (2014).
13. *Id.*
14. *See* HANS LINDAHL, FAULT LINES OF GLOBALIZATION 30–31 (2013).

the neighborhood, the protestors attempt to *leave* the extant territorial configurations of their respective states, even though they do not seek to cross the border leading into a foreign country.

Allow me to summarize this highly abridged distinction between two senses of the inside/outside distinction in the following way: whereas *borders* speak to the distinction between the domestic and the foreign, *limits* refer to the distinction between own and strange places. Whereas only borders partition space into the domestic and the foreign, *all* spatial boundaries of legal orders can appear as limits between own and strange places. In effect, the spatial boundaries of the prison, the square, and the neighborhood are by no means the borders that separate the United States from Mexico or Canada, or Argentina from Chile, or Uruguay from Brazil. But, when transgressed by a-legal behavior, they appear as a limit that joins and separates what counts as a state collective's own place and a strange place. A further and crucial implication follows from this distinction. Indeed, the two forms of the inside/outside distinction are irreducible to each other: if the foreign need not be strange, so also the strange need not be foreign.

Paul Schiff Berman holds, in his analysis of what he calls "sovereigntist territorialism," that "we must look elsewhere for a more capacious, fluid conception of law beyond borders."[15] It may be the case that spatial closure in the form of bordered territories is a historically determinate and contingent feature of legal orders. In fact, we already are witness to emergent global legal orders, such as the WTO, which are not spatially organized in terms of the distinction between the domestic and the foreign, even though it relies on Member States. So, yes, legal theory, if it is to account for the emergence of global legal orders, must shake itself loose from what has been called methodological nationalism, developing a more comprehensive model of law that incorporates the possibility of law beyond borders. But would this more capacious concept of law also be a *law beyond limits*? Is any global legal order imaginable that does not close itself into an inside vis-à-vis a strange outside? Might the closure into an inside vis-à-vis an outside be a constitutive, rather than contingent, feature of any possible global legal orders? Hence, might the price to be paid for these orders' claims to global validity is their continued exposure to the transgression of their boundaries by xenotopic behavior which claims that justice is not here, in the global legal order, but elsewhere?

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15. PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 127 (2012).

II. THE ROME STATUTE: GLOBAL JUSTICE AS CRIMINAL JUSTICE

It would not be difficult to show, when looking at global legal orders, that the WTO, for example, emerges by way of a spatial closure into an inside vis-à-vis an outside; in the process of giving rise to a global market, the WTO marginalizes forms of exchange which resist commodification. This marginalization has and continues to spark contestation by a range of alter-globalization movements. Most prominently perhaps, Seattle briefly became a xenotopia during the protests against the WTO Ministerial Conference of 1999.[16] Also, and regularly, a range of places throughout the world become xenotopic in the course of resistance against the WTO by the Via Campesina, the International Peasant's Movement, which brings together over 200 million peasants and 182 organizations from eighty-one countries around the world.[17] For example, the motto of the Via Campesina, "Globalizing Hope, Globalizing the Struggle," calls for a counter-globalization that "promote[s] social justice and dignity and strongly opposes corporate driven agriculture that destroys social relations and nature."[18]

But while the WTO provides a relatively easy example to validate the conjecture that the distinction between own and strange places is an ingredient feature of all emergent global legal orders, we do well to examine the emergence of legal orders that, on some accounts, aspire not only to global but to *universal* validity, that is, a claim to validity that cannot but hold indisputably and without exception for all of humanity, everywhere on earth. When someone asserts that a legal order is universal, she or he effectively holds that whoever resists that assertion challenges our common humanity. Such a challenge, by implication, must be dismissed as either specious or in bad faith because those who raise it deny their own humanity.

A prima facie candidate for this strong sense of global law is the international criminal law regime, in particular the Rome Statute. In effect, the Statute, which was adopted on July 17, 1999, and entered into force on July 1, 2002, established the International Criminal Court (ICC) to investigate and prosecute "the most serious crimes of concern to

16. WE ARE EVERYWHERE: THE IRRESISTIBLE RISE OF GLOBAL ANTI-CAPITALISM 208 (Notes from Nowhere ed., 2003).

17. "*WTO Out! Building Sovereignty": La Via Campesina to Organise Peoples' Summit During WTO's XI Ministerial Conference in Argentina*" LA VIA CAMPESINA (Nov. 17, 2017), https://viacampesina.org/en/wto-building-alternatives-la-via-campesina-organise-peoples-summit-wtos-xi-ministerial-conference-argentina/.

18. *The International Peasant's Voice*, LA VIA CAMPESINA, https://viacampesina.org/en/international-peasants-voice/ (last visited Mar. 27, 2018).

the international community,"[19] as its Preamble puts it, namely, genocide, crimes against humanity, war crimes, and the crime of aggression.[20] Moreover, the final Consideration of the Preamble asserts that the parties are "resolved to guarantee lasting respect for and the enforcement of international justice."[21] This candidate for a universal legal order is especially appropriate because it is, on the face of it, the inverted image of the Marion Federal Penitentiary. Both cases turn on the archetypical legal place, a prison, if law is that kind of normative order that is oriented to enforcing certain kinds of behavior of essential importance to society. But whereas resistance by the PPLF challenges the justice of a penitentiary regime, of solitary confinement in particular, and hence contests that justice has been rendered by assigning to political prisoners their own place, the Rome Statute claims that prison is where those who have committed any of the four crimes that fall under its jurisdiction must belong. Surely, one would say, prison is where those condemned for these atrocities belong unconditionally, regardless of their nationality and regardless of where the atrocities took place. Can there be any doubt that putting war criminals into prison is to render global justice by assigning to them what is indisputably their own place because they have breached our common humanity?

Certainly, the Statute does not enjoy universal validity in a legal sense of the term: the treaty was adopted by a vote of 120 to seven, with twenty-one states abstaining. The seven states which voted against the Statute were the United States, China, Libya, Iraq, Israel, Qatar and Yemen.[22] But many take for granted that the Preamble to the Rome Statute *claims* universal validity, when it asserts jurisdiction with regard to "the most serious crimes of concern to the international community *as a whole*."[23] I will return at the end of this article to reconsider whether the wording of the Preamble actually endorses attributing a claim to universality to the Rome Statute. For the time being, it certainly is the case that, according to the Preamble, the parties which adopt the Rome Statute claim to represent humanity as a whole, and that the jurisdiction of the ICC should in due course cover the entire face of the earth, even if such is not yet the case. In contrast

19. *See* Rome Statute of the International Criminal Court pmbl., Jul. 17, 1998, 2187 U.N.T.S. 28544 (corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002).

20. *See id.* art. 5.

21. *See id.* pmbl.

22. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, INSIGHTS, Aug. 11, 1998.

23. *See* Rome Statute of the International Criminal Court, *supra* note 19 (emphasis added).

to the WTO, it is then a quick step to conclude that the Rome Statute inaugurates a global legal order that aspires to an inside without an outside. On the face of it, or so the international criminal law movement asserts, the Rome Statute is an emergent global legal order that not only has no borders but also no limits, by dint of aspiring to be valid for all rather than for only part of humanity, and to be valid everywhere rather than somewhere. In short, the Rome Statute seems to illustrate the possibility of "law beyond limits." Extending my riff to Caney's "justice beyond borders," the Rome Statute also seems to illustrate the possibility of global justice in the strong sense of the term: justice beyond limits.

The concrete operation of the Rome Statute suggests otherwise, however. I do not have in mind the troubling fact that only Africans have been prosecuted by the ICC,

> [a] decision [that] has been a function of international power relations which make Africa the only region weak enough so that Western intervention and experimentation can take place there without accountability, and unimportant enough so that the West will allow the ICC to act as its sub-contractor there in place of more direct forms of intervention.[24]

Nor, continuing with Branch, do I want to focus on the fact that the ICC has also "accommodated itself to political power *within* Africa," as is "very clear in Uganda, where the ICC eagerly became an instrument of the Ugandan government's counterinsurgency so as to ensure Uganda's cooperation with its prosecution of the LRA [Lord's Revolutionary Army]."[25] While both critiques are compelling, neither is sufficient to call into question the claim to universality some have raised on behalf of the Rome Statute. Indeed, the champion of this claim could turn the critiques on their head, arguing that they hit home because universality works as the criterion of global justice that allows critiquing the concrete operation of the ICC. What would be required, the international criminal law movement has argued, is to extend the jurisdiction of the ICC to all countries in the world and to grant it powers of enforcement to ensure that the four envisaged crimes do not

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24. Adam Branch, *What the ICC Review Conference Can't Fix*, OTJR BLOG (Mar.15, 2010), https://oxfordtransitionaljustice.wordpress.com/2011/10/10/what-the-icc-review-conference-can%e2%80%99t-fix/.

25. *Id.*; *see also* Adam Branch, *Neither Liberal nor Peaceful? Practices of 'Global Justice' by the ICC*, *in* A LIBERAL PEACE? 121–37 (Susanna Campbell, David Chandler & Meera Shabaratnam eds., 2011).

go unpunished anywhere in the world—including the seven states which voted against the Statute.[26] For the Coalition for the International Criminal Court and likeminded individuals and groups, the concrete operation of the ICC exposes its de facto deficiencies, not the Statute's de jure claim to universal validity. Yet rather than the vicissitudes tainting the de facto operation of the ICC, what interests me is to probe the de jure claim to universal validity attributed to the Statute.

The particular case I have in mind is the ICC's assertion of jurisdiction to investigate and punish members of the LRA for the atrocities perpetrated against the Acholi community in Northern Uganda, to which many members of the LRA belonged.[27] What is of paramount importance for my purposes is the response of the Acholi, qua *victims* of these atrocities, to ICC jurisdiction, rather than that the ICC allowed itself to be manipulated by the Ugandan government, as pointed out by Branch and others. For acting on behalf of their community, a group of Acholi Elders travelled to The Hague, the seat of the ICC, to oppose its assertion of jurisdiction to investigate and punish crimes perpetrated by the LRA.[28] The Acholi argued that "[t]he court system is justice through punishment. The offender and offended are put aside. This leads to polarization which will lead to death."[29] Taking issue with the Prosecutor's move to frame the atrocities as the subject matter of international criminal justice, the Acholi called for applying restorative justice to those leaders of the LRA who were members of the Acholi community. In the words of a member of the Acholi community, "in traditional Acholi culture, justice is done for *ber bedo*, to restore harmonious life."[30] This involves creating trust in the parties involved in

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26. See, for example, the position of the Coalition for the International Criminal Court, which asserts that:

[t]he International Criminal Court must continue to evolve into the global court the world demands of it. We work to ensure that the ICC develops as a fair, effective and independent Court that sets global justice standards, remains free from political interference, and delivers meaningful justice to victims on all sides of conflicts throughout the world.

A Strong ICC, COALITION FOR INT'L CRIM. CT., http://www.coalitionfortheicc.org/fight/strong-international-criminal-court (last visited Mar. 27, 2018).

27. I explore this case from the perspective of the possibilities and limitations of the principle of complementarity in my forthcoming monograph. HANS LINDAHL, AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION (forthcoming 2018).

28. Sarah M.H. Nouwen & Wouter G. Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157, 165–66 (2015).

29. *Id.* (citation omitted).

30. LIU INSTITUTE FOR GLOBAL ISSUES, GULU DISTRICT NGO FORUM & KER KWARO ACHOLI, ROCO WAT I ACOLI: RESTORING RELATIONSHIPS IN ACHOLI-LAND 14 (2005),

mediation, having the voluntary willingness of the perpetrator to confess, establishing the facts of a particular conflict, compensating for the damage that has been done, and undergoing the celebration of rituals oriented to restoring social harmony in the community.[31]

The ICC dismissed the Acholi Elders' plea, holding that their plea was a traditional and local form of justice that did not meet the international standards required to properly challenge the Court's admission of the case. As Nouwen and Werner perceptively note,

> [c]ontrasted with the ICC's 'global justice', other conceptions of justice all of a sudden appear as particular, local and traditional. Such traditions are accepted as forms of justice *in addition* to international criminal law. But as *alternatives to* international criminal justice they are accepted only if they live up to the apparently 'de-localized', 'modern' and most of all 'higher' standards of 'global justice' applied by the ICC.[32]

Certainly, the principle of complementarity would have allowed the ICC to leave the investigation and punishment of the LRA to Uganda. According to this principle, which amounts to a specification of the principle of subsidiarity, the ICC can only investigate and prosecute if a "State is unwilling or unable genuinely to carry out the investigation or prosecution," or if the decision by a state that has jurisdiction not to prosecute the respective person results "from the unwillingness or inability of the State genuinely to prosecute."[33] But, regardless of the political motivations brought into play by the Prosecutor of the ICC, Luis Moreno Ocampo, and by the Ugandan government, the principle of complementarity has its limitations: it "creates space for an alternative forum of *criminal* justice to that of the ICC, but not to an *alternative* conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice."[34] In short, "the

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https://liu.arts.ubc.ca/wp-content/uploads/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf (citation omitted).

31. *Id.* at 14–16.

32. Nouwen & Werner, *supra* note 28, at 167.

33. Rome Statute of the International Criminal Court, *supra* note 19, art. 17, ¶¶ 1(a)–(b). For an excellent study on the principle of complementarity, see generally SARAH M. H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN (Chris Arup et al. series eds., 2013) (exploring whether complementarity between the ICC and Uganda and Sudan has catalyzed national investigations and prosecutions of conflict-related crimes).

34. Nouwen & Werner, *supra* note 28, at 174 (emphasis added).

institutionalization of global justice through international criminal tribunals potentially marginalizes alternative conceptions of justice."[35]

Mark Drumbl points out that it is not necessarily the case that "restorative initiatives by definition are always salutary."[36] In particular, he avers, "restorative modalities that draw parallels from mechanisms used to reintegrate ordinary deviant transgressors in settled times will likely run afoul of the complexities of reintegration in situations of mass atrocity."[37] But this is a judgment that needs to be made contextually; moreover, who gets to make the judgment? Most importantly, Acholi's resistance to the ICC's assertion of jurisdiction reveals that the Rome Statute represents global justice—that is, what we, humanity, take to be justice—as *punishment*, rather than as *restoration*. While a certain accommodation between the two conceptions of justice is possible, they respond to two very different—in some ways incompatible—understandings of the wrong that has been done and of how it should be redressed.

This is by no means an argument against international criminal law. What I want to argue is that claiming universal validity for the Rome Statute amounts to collapsing global justice into criminal justice, equating how the Statute draws the distinction between legality and illegality with the distinction between justice and injustice. When exercising its jurisdiction, the ICC holds that criminal justice must trump restorative justice because the latter is traditional and local, whereas the former is modern and universal; as a result, the ICC excludes humanity from global justice in the very process of including it through criminal justice. Inclusion and exclusion should be understood literally here, for Acholi land is not simply one place in the concinnity of interconnected places that make up the ICC's jurisdiction. What defines their land as an ought-place for the Acholi does not simply coincide with what determines it as an ought-place for the Rome Statute and the ICC. When the Elders travelled to make their depositions to the ICC, Acholi land became xenotopic vis-à-vis the court and its criminal jurisdiction.

Bluntly, the justice rendered by the ICC, when applying the Rome Statute, is no less traditional and no less local than the forms of justice it subordinates to punishment when invoking the modern and the universal. It is no less traditional, because, like restorative justice for the Acholi, international criminal law is informed by a concrete, historically specific interpretation of human beings and the society in which they live. It is no less local, because, by representing global justice as criminal justice, the Rome Statute brings about a spatial

35. *Id.* at 163.
36. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 148 (2007).
37. *Id.*

closure, a certain way of interpreting ought-places that constitutes this global legal order as an inside vis-à-vis a strange outside. To dispense global justice in the form of criminal justice is to say the law—*jurisdictio*—from somewhere, rather than from everywhere. This also holds for the Acholi, of course, when they dispense justice in the form of restorative justice. Global law can only be law if it involves inclusion and exclusion, that is, if it is local law.[38]

III. REPRESENTATION AND THE EMERGENCE OF (GLOBAL) LEGAL ORDERS

The analysis of Acholi resistance to the jurisdiction of the ICC supports the conjecture, advanced at the end of Section I, that a spatial closure, in the form of the contrast between own and strange places, is constitutive for all legal orders, global or otherwise. Before turning to explore the implications of this finding for global justice, we first need to provide it with a conceptual grounding if the finding is to be more than just a conjecture. Such is the task of this Section. I will defend the thesis that the key to its conceptual grounding lies in the problem of representation. The idea, in abridged form, is the following: because collective unity is always a represented unity, and because representation always involves inclusion and exclusion, there can be no representation of the international community as a whole, other than by excluding humanity in the very process of including it. Let me now offer a conceptual justification of this thesis.

The Preamble to the Rome Statute reads as follows: "The States Parties to this Statute . . . have agreed as follows."[39] Although formulated in a declarative mode, the Preamble is prescriptive in character, spelling out the obligations the parties take upon themselves in the interests of the international community. Notice, furthermore, that the Rome Statute only works as an international treaty if, regardless of the third-person formulation employed by the Preamble, it is enacted in the first-person plural: "*We* the States Parties to this Statute . . . have agreed as follows." Moreover, teasing out the specific nature of the first-person plural perspective taken up by the parties to the Statute, the Preamble implicitly asserts that "We . . . have *jointly* agreed as follows." Indeed, the Rome Statute marks the emergence of a collective subject the members of which commit to acting together as a group with a view to realizing the point of their collective action,

38. My thesis is not that the Rome Statute is a form of "glocal" law, which would imply that it conjoins the global and the local; it is that all forms of law are local law, that the expression is pleonastic. *See* Rome Statute of the International Criminal Court, *supra* note 19.

39. *See* Rome Statute of the International Criminal Court, *supra* note 19, pmbl.

namely, contributing to global justice by ensuring that the most serious crimes of concern to the international community as a whole do not go unpunished. To borrow Margaret Gilbert's useful distinction, collective action involves an integrative use of the pronoun "we": "we together" in contrast to an aggregative use of "we each."[40] This integrative use of the pronoun is also at work in the preambles to state constitutions, a canonical formulation of which is, of course, to be found in the Preamble to the U.S. Constitution: "We the people . . . do ordain . . ."[41] Regardless of the differences between enacting an international treaty and a state constitution, both cases involve the emergence of collective action by what Gilbert would call a "plural subject."[42] Significantly, this integrative use of the pronoun is also deployed in collective resistance by the PPLF, the Occupy Wall Street movement, and the MTD.[43] Henceforth, I will use the expressions we* or us* when referring to plural subjectivity.

Crucially, the first-person plural perspective is invoked, explicitly or implicitly, when individuals refer to a legal order as their "own," or speak of "our" law, in the same way that the first-person singular perspective is invoked when individuals use the adjectives "my" or "mine." This may sound trivial, but remember that I am attempting to provide a conceptual grounding for why the distinction between the own and the strange might be constitutive for all legal orders, global or otherwise. Well, we now have a conceptual justification of the first term of these two contrasts: legal orders presuppose the first-person plural perspective of a plural subject, and it is from this perspective that a domain of what is deemed to be "our own" can be invoked and asserted. Moreover, the invocation of a collective domain of "our own" includes the invocation of "our own space": depending on the point of our joint action, we will organize space in one way or another, distinguishing and interconnecting ought-places as places in which certain kinds of behavior ought to take place because they are important and relevant to the realization of the point of our joint action. So, for example, the Rome Statute prohibits the commission of the four crimes that are the object of its jurisdiction in each signatory state, the territories of which are distinct from but connected to all others, while also linking this

40. MARGARET GILBERT, ON SOCIAL FACTS 168 (reprint 1992) (1989).

41. U.S. CONST. pmbl.

42. MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION 189 (2006).

43. So, for example, the spokespersons of the PPLF called on inmates to participate in the work stoppages, asserting that "[t]he convicts of this institution of Marion prison have in the past experienced many difficulties which were resolved by a collective effort . . . . Therefore, to deal with our immediate problem, we: the concerned prisoners ask every prisoner to cooperate in a general work stoppage . . . ." Gómez, *supra* note 8, at 72.

interconnected distribution of ought-places (in the form of prohibition-places) to the place where the ICC renders justice, that is, a court house, and to a prison. Given the point of joint action under the Statute, other ways of organizing the space of this legal order may be irrelevant and unimportant, for example, the distinction between public and private places.

But we still are at a loss as to why something like a domain of the "strange" might also be constitutive for legal orders, as well as why plural subjectivity demands a spatial closure into an inside vis-à-vis an outside. A first step to explaining strangeness is taken by disambiguating we*. Drawing on and modifying a seminal article by Bert van Roermund, I propose to parse we* into three positions: we* speaker, we* at stake, and we* author.[44]

The first of these positions refers to those individuals who speak/act on behalf of a collective. We touch here on an absolutely fundamental feature of collective action, regardless of whether it is two or two billion participants who act together: the unity of a plural subject is always and necessarily a *represented* unity. In other words, a plural subject intends, believes, and acts through its participants. Collective acts are acts that someone, whether a participant or a third party, imputes or ascribes to a collective as being its act (or intention or belief). For example, that "We the (American) People" have enacted a constitution that requires that a constituent assembly, composed of a number of individuals, seizes the initiative to speak on behalf of the American people. In the same way, "We the States parties to this Statute have agreed the following," requires that the State Parties seize the initiative to speak on behalf of "the international community as a whole," that is, that it is the international community as a whole which intends, believes, and acts through the participant states. As a result, the unity implied in we* is always and only given indirectly, through its representations. *That* we* are a unity and *what* we* are a unity is established in the course of acts that are deemed to be acts of the collective, that is, acts which are held to represent us*. To borrow a handy distinction coined by Nelson Goodman, representation is representation *of* (a collective) and its representation *as* (this or that unity).[45]

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44. *See generally* Bert van Roermund, *First-Person Plural Legislature: Political Reflexivity and Representation*, 6 PHIL. EXPLORATIONS 235 (2003) (arguing for a first-person plural counterpart of the reflexive structure inherent to intentions generally).

45. *See* NELSON GOODMAN, LANGUAGES OF ART 27 (2d prtg. 1968). A further implication of the insight that collective unity is always a represented unity is that participation, which political theorists usually oppose to representation, is itself a form of representation. Representation is an indispensable feature of plural subjectivity quite simply because we* cannot say we*; someone must say "we" on behalf of we*. *See*

So much for the first we* position, namely, we* speaker. The second position, we* at stake, concerns the collective for the sake of which individuals or groups act as representatives by positing and enforcing the law. Those who take up the we* speaker position claim to enact and enforce rules—a constitution, a treaty—in the interest of a collective, for example, we* the American people or we* the international community. As concerns the Rome Statute, and in light of the gravity of the crimes envisaged, the Preamble's reference to the international community should be glossed as meaning we* the human community. Indeed, according to the first Consideration of the Preamble, "all peoples are united by common bonds, their cultures pieced together in a shared heritage"; the second Consideration refers to the perpetration of "unimaginable atrocities that deeply shock the conscience of humanity"; the third asserts that "such grave crimes threaten the peace, security and well-being of the world"; finally, the ninth states that the Rome Statute is enacted "for the sake of present and future generations." This is not to say, of course, that all of humanity has jointly enacted the treaty and established the ICC, for, as we have seen, seven states refused to adopt the Statute. In terms of our three we* positions, most, but not all, of we* the *human community* are deemed to have enacted the treaty, that is, to have *authored* it: we* author. In other words, there is no identity between the *we at stake and the we* author positions as concerns the Rome Statute, but its signing parties aspire to bring about this identity by having all states that belong to the international community ratify the Statute.

A second step can now be taken in the direction of explaining why the emergence of the first-person plural perspective of a plural subject, whether it be a people or the international or even human plural subject, also gives rise to the strange, in addition to a collective domain of "our own." As noted earlier, because we* cannot say "we*," someone must seize the initiative to represent a collective, acting without a prior authorization to do so by the we* at stake. Moreover, returning to Goodman's formulation, a collective is represented as *this* unity, whereas it could have been represented as *that* (other) unity. In other words, a certain range of individuals is included as committed to jointly pursuing *x* rather than jointly pursuing *y* or *z*. Accordingly, the representation of collective unity cannot *include* individuals and/or groups in a we* at stake without also *excluding* from that we*, thereby creating the conditions for resistance to the representational claim: "Not in our name!" This cry can take on either of two forms. "I/we have been

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BERNHARD WALDENFELS, VERFREMDUNG DER MODERNE: PHÄNOMENOLOGISCHE GRENZGÄNGE 140 (2001).

excluded, but want to be included!" Or: "I/we have been included but want to be excluded!" While political theorists are particularly attentive to exclusion, representation also gives rise to resistance to inclusion, as when indigenous peoples contest their inclusion in "We the people do hereby ordain . . ." In short, representational acts are always *contestable*, defeasible claims. The contestability of claims to collective unity raised by we* speaker entails that no plural subject is ever fully a unity, never entirely identical to itself—nor entirely different from its others.

This is why the representational acts at the inception of a legal order, global or otherwise, not only give rise to the first-person plural perspective of what counts as a domain of our own but also to the *strange*—to a-legality. For the strange, or a-legal, as introduced in Section I, manifests itself through forms of behavior that challenge how a legal order draws the distinction between legality and illegality, which resist how, say, a constitution or an international treaty represents what joins us together. These challenges make visible that representation cannot include what is important and relevant without also excluding what is considered irrelevant and unimportant to our collective action. Furthermore, inclusion and exclusion should be understood literally: as a spatial closure. As noted earlier, establishing what we ought to do together requires carving out a certain space of action—an interconnected distribution of ought-places—that establishes *where* certain forms of behavior ought to take place. Behavior is legal or illegal depending on whether it takes place where it is commanded, permitted, or prohibited. By contrast, strange behavior registers as emplaced or misplaced within that order, that is, as legal or illegal, *and* as displaced because it challenges where a certain form of behavior ought to take place: a xenotopia.

A conceptual grounding of why the Rome Statute cannot emerge as a global legal order unless it closes itself as an inside vis-à-vis an outside can now be offered. In a nutshell, whoever claims to represent humanity as a whole by enacting a legal order with global validity claims to represent us*, the human community, and determines what our collection action ought to be about. By laying down the point of collective action under the Rome Statute, the states which are party thereto represent humanity in a twofold sense of the term: they impute a legal order to humanity (representation of) and they represent humanity as oriented to punishing the most serious crimes of concern to the international community as a whole (representation as). In the course of representing humanity as this rather than as that, namely, as oriented to realizing global justice through punishment rather than through restoration, they exclude humanity in the very process of

including it, enclosing the globe as that configuration of ought-places which is appropriate to criminal justice, while marginalizing places germane to restorative justice. Humanity is inside and outside the Rome Statute's invocations of "the international community as a whole" and "international justice."

IV. LEGAL ORDER AND JUSTICE

What sense, then, to make of global justice, both as global and as justice, if emergent global legal orders are necessarily local in character? Concretely, if the Rome Statute renders global justice in the form of criminal justice, how could it dispense justice when confronted with challenges to its claim that it represents humanity as a whole?

As a first step, let us examine how legal orders are connected to justice, global or otherwise. When introducing the concept of justice, I referred to what are perhaps its two best-known formulations: to each their own and treat the equal equally and the unequal unequally. Both amount to injunctions addressed to an *agent*, who can act either justly or unjustly. Here, then, is an initial foothold: justice is a first-person concept. As it concerns the justice of a legal order, it is a first-person *plural* concept. Although it will be in each case an authority that is expected to act justly when positing the law, the authority does so on behalf of the plural subject it represents. We* posit the law justly or unjustly.

Notice, furthermore, that in both formulations justice implies a manifold of elements, in the broadest possible sense of the word, which are to be allotted. To each their own involves assigning to an individual or group any of a range of elements. The second formulation does so as well, when it refers to equality and inequality. In short, justice involves an order, which both differentiates and joins together a manifold of elements into a whole. This is another way of saying that justice is a virtue predicated of a legal order qua order.

How is it that the law orders behavior by agents who participate in collective action? The standard response is, of course, by assigning rights, obligations, and the like, whether to individuals or to groups, indicating what kind of behavior ought to take place. This response is correct as far as it goes. But it is incomplete. To see why, consider Hans Kelsen's distinction between the four "spheres of validity" of legal norms: temporal, spatial, material, and subjective.[46] Succinctly, a legal order orders behavior by establishing *who ought to do what, where, and*

46. *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 12 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934).

when, where "ought" has, as we have seen, the threefold meaning of command, prohibition, and permission. Legal orders are not only putative unities of rules, as legal scholars are wont to think. From the first-person perspective of agents, legal orders are also putative unities that articulate the four normative dimensions of rules. Legal rules offer guidelines for agents to orient themselves in space (where), in time (when), qua subjects (who), and qua action (what). So, for example, a potential client (who) enters a supermarket (where), stuffs some groceries into a pannier, then (time) pays for the products (what), and walks back out to the street. As this example shows, a legal order qua unity of a manifold of rules has its counterpart in the unity of what one might call a *pragmatic order*, that is, an order that structures action as an interrelated manifold of places, times, subjects, and act-contents. A right or an obligation to act in a certain way is a right or an obligation to do something at a certain place, at a certain time, by a certain subject. In the course of determining who ought to do what, where, and when, a legal order establishes what counts as legal or illegal behavior; conversely, (il)legality is fixed in terms of who ought to do what, where, and when.[47]

Now, if justice is the virtue of a legal order that, qua order, articulates what we* hold in common, it follows that justice is never only about allotting rights and obligations to legal subjects; it also concerns how legal orders differentiate and interconnect places, times, subjectivities, and act-contents. "To each their own" amounts to the following: to each their own place, to each their own subjectivity, to each their own time and to each their own act, in light of what we* understand ourselves to hold in common. Likewise, the second of the injunctions to act justly amounts to the demand that places, subjectivities, act-contents and temporalities be meted out in a way that appropriately reflects equality and inequality, that is, in terms of the kind of behavior that ought to come about with a view to realize the point of joint action. When one challenges a right or obligation as unjust because of how the legal order qualifies behavior as (il)legal, one ipso facto challenges how that order differentiates and interconnects the who, what, where, and when of the case at hand. This is what I called a-legality: behavior that registers in the legal order as either legal or illegal, yet which challenges what we* qualify as (il)legal. Spatially speaking, claims that a legal order is unjust entail calling into question how it distributes and interconnects places into a unity of legal places

47. For a more detailed analysis of this feature of legal orders, see LINDAHL, *supra* note 14, at 13–18.

through behavior that intimates a domain outside of what we* have called our own place: a strange place—a xenotopia.

It is this connection between legal orders and (spatial) justice, which the PPLF calls into question when initiating work stoppage. Alter-globalization movements, such as the Occupy Wall Street movement and the Argentinian *piqueteros*, also challenge this connection when attempting to reclaim a territory from which they have been dispossessed, as do the Acholi Elders contest when asserting that members of the LRA should participate in restorative rites in Acholi land, rather than be tried under the jurisdiction of the ICC. In each case, the claim that a legal order is unjust entails the assertion that justice is *elsewhere*, not "here," where authorities claim to speak the law—*jurisdictio*. In each case the boundaries of legal orders appear as its *limits*, whether or not they are the borders of a state territory. The experience of injustice is the experience of the boundaries of a legal order, global or otherwise, as a limit beyond which beckons another configuration of who ought to do what, where, and when.

V. JUSTICE AS RECIPROCAL RECOGNITION

Having clarified the inner connection between legal order and justice, and how that link can be contested such that (il)legality ceases to coincide with (in)justice, we must now consider how contestation takes place and how legal orders respond to it. For, as Ricœur puts it, "undoubtedly one must acknowledge that we are first sensitive to injustice [rather than to justice]: 'Unjust!', 'What an injustice!', we cry out to ourselves."[48] What is the nature of this cry? A demand for *recognition* of an identity/difference threatened or violated by a legal order. My thesis is that (in)justice plays out in the struggles for recognition, which arise as a result of the inclusion in and exclusion from legal orders wrought by the representation of collective unity. The PPLF, the alter-globalization movements, and the Acholi decry the injustice that is visited on them, and they do so by calling attention to the misrecognition arising from how a given legal order draws the boundaries of (il)legality.

Every legal order must respond, in one way or another, to the demands for recognition with which it is confronted, even if only to ignore them. And this means that, by responding to demands for recognition, every legal collective is confronted with the question about its own identity and what differentiates it from other plural subjects: Who are we*? What is and ought our joint action to be about? The two

48. PAUL RICŒUR, LECTURES 1, AUTOUR DU POLITIQUE 177 (1999).

highly abstract formulations of justice alluded to earlier acquire a concrete content in the dynamic of question and response through which a collective responds to demands for recognition by resetting the boundaries of who ought to do what, where, and when. In our responses, we* attempt to restore the inner connection of (il)legality to (in)justice, whether confirming what we* hitherto qualified as (il)legal behavior or drawing this distinction differently. This is but a corollary of the thesis that justice, as it pertains to legal orders, global or otherwise, is a first-person plural concept.

But what might render our responses to demands for recognition just or unjust? Is there an independent criterion that could settle the question about the (in)justice of legal orders in the face of demands for recognition of an identity/difference threatened or violated by a legal order? What does it mean to recognize the other as the condition for justice?

For theories of justice of a universal bent, those and only those legal orders or institutions are just that allow all those who are subject to a legal order to reciprocally recognize each other as free and equal beings.[49] Whence universalism's dialectical interpretation of the dynamic of question and response proper to justice: an initial situation of misrecognition and injustice calls forth a response by us*, whereby, if we* act in good faith, we* transform the terms of (il)legality such that we* can come to recognize ourselves in the other, and so also the other in ourselves. Paraphrasing a terse formulation by Jürgen Habermas, recognition of "the other *as one of us* refers to the flexible 'we' of a community that resists all substantive determinations and extends its permeable boundaries ever further."[50] If a demand for recognition arises as the result of unjustified exclusion from we* who are at stake, we* ought to respond by including those whom had been excluded, such that they can view themselves as members in full standing of our community. For theories of reciprocal recognition, all recognition is, ultimately, *collective self-recognition*. Justice as reciprocal recognition boils down to the reciprocity of self-recognition in the other: we*

49. In a paper titled *Justice as Reciprocity*, Rawls neatly formulates this idea as follows: "[T]he question of reciprocity arises when free persons, who have no moral authority over one another and who are engaging in or who find themselves participating in a joint activity, are among themselves settling upon or acknowledging the rules which define it and which determine their respective shares in its benefits and burdens." JOHN RAWLS, *Justice as Reciprocity*, *in* COLLECTED PAPERS 190, 208 (Samuel Freeman ed., 2d prtg. 1999).

50. Habermas refers to solidarity, rather than to recognition, but the thesis also holds for the latter. JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY xxxv–xxxvi (Ciaran Cronin & Pablo de Greiff eds., Mass. Inst. of Tech. trans., Mass. Inst. of Tech. 3d prtg. 2001) (1996).

recognize ourselves in the other, and the other recognizes herself in us*. For universalism, to act justly, in the face of a demand for recognition, is to reconstitute our collective unity at a higher level of generality, while also allowing for plurality *within* that unity—*e pluribus unum*. The outcome of this dialectic between collective self and other, if things go well, is that we* can again claim, even if only for the time being, to have a just legal order which allots to each their own, that is, which treats the equal equally and the unequal unequally. Ultimately, to obey the injunction to act justly when positing the law is to obey "the injunction to complete inclusion."[51]

Global justice, for theories of reciprocal recognition, will be realized by a legal order, which includes all of humanity and is thus valid everywhere, rather than somewhere: a legal order with an inside but no outside. While it may be necessary to postpone its realization indefinitely in historical time, global justice as universal justice is in principle possible because parties in conflict about who ought to do what, where, and when can come to reciprocally recognize each other as consociates within a single legal order which treats them as the same, namely as free and equal agents, while also recognizing them as different.

VI. THE ASYMMETRIES OF RECOGNITION

Will the model of (global) justice as reciprocal recognition work? This is a massive question, far bigger than what I can either answer or justify in the remainder of this article. A more cautious and modest way of approaching it is this: does reciprocal recognition really get at how global justice might be dispensed in the face of Acholi resistance to the ICC's assertion of jurisdiction for the atrocities committed in their land? No, or so I will argue: reciprocal recognition is blind to the double asymmetry that characterizes the dynamic of question and response in which struggles for recognition play out, and which is particularly manifest in the case of Acholi resistance to ICC jurisdiction. With theories of reciprocal recognition, I hold that struggles for recognition are the focal point of global (in)justice. Against theories of reciprocal recognition, I aver that a collective's recognition of an identity/difference it threatens or violates has an asymmetrical structure, which precludes interpreting justice as a process of rendering legal orders ever more inclusive. Such an all-inclusive order is what Kant would call its "regulative idea." Asymmetrical recognition amounts to drawing the

51. JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 148 (Max Pensky ed. & trans., Mass. Inst. of Tech. 2001) (1998).

boundaries of (il)legality in a way which recognizes the other (in ourselves) as one of us and as other than us.

A first asymmetry in struggles for recognition concerns the anteriority of the question with respect to a collective's response. By such I do not mean a simple chronological priority, such that there first has to be a question, in the form of a demand for recognition, before there can be a response. Instead, at stake is a normative challenge to who we* are that comes *too early* because it catches us* unprepared and at a loss as to how to respond to it. While legal orders create normative expectations about behavior, and thereby also anticipate the possibility of illegal behavior, what I have called a-legality consists in a form of behavior that disorients us* by challenging *both* terms of the legal/illegal distinction. The a-legality of demands for recognition is anterior to joint action because it catches a collective by surprise, intimating ways of acting and living together that the legal order did not anticipate, hence a future that arrives in advance of the future, which we had counted on and thereby already rendered present.

This is exactly what happened with the Acholi: from the first-person plural perspective of the "international community as a whole," as represented by the ICC, one would have anticipated that, in light of the atrocities committed in Northern Uganda, the Acholi community would have welcomed criminal punishment for the LRA, either by the Ugandan government or, subsidiarily, by the ICC, if the Ugandan government was unable or unwilling to investigate and prosecute those crimes. Instead, and against these expectations, the Elders demanded that the ICC desist from asserting its jurisdiction over Acholi members of the LRA, making room for restorative justice rituals in the Acholi communities. The Acholi's resistance is a demand for recognition of an identity/difference threatened or violated by the ICC's exercise of criminal justice. Their resistance contests both terms of the contrast between legality and illegality by evincing other ways of acting together, other practical possibilities of dealing with an atrocity, than those contemplated by the Rome Statute.

A second asymmetry in struggles of recognition turns on the retroactivity of the response to what questions or challenges a plural subject's legal order. By this I mean that collectives will frame their responses to demands for recognition in such a way that their acts of recognition of the other are acts of collective *self*-recognition. While a collective can certainly transform how it draws the distinction between the legal and the illegal, demands for recognition will be framed as the question, "What is/ought *our* joint action to be about?" When recognizing the other, we* have to be able to continue recognizing ourselves as the collective which we* are and want to continue being. The retroactivity of

responsiveness consists in framing demands for recognition in a way that renders them orderable for the collective in terms of its own normative possibilities. As a result, there is always normative remainder in the demand for recognition that doesn't get addressed by the collective's response.

This is what happened in the case of Acholi resistance, when the Elders demanded that criminal justice give way to restorative justice. Their demand was waved away, ignored, as a local and traditional practice that did not meet the global and modern standards of international criminal justice. Assuredly, one could have imagined that the ICC would have been able to act otherwise. The ICC might have sought to bring pressure to bear on the Ugandan government to investigate and prosecute the crimes, or it might have contemplated restorative justice as supplementary to its criminal justice. But, as Nouwen and Werner pointed out in an earlier citation, the principle of complementarity "creates space for an alternative forum of *criminal* justice to that of the ICC, but not to an *alternative* conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice." Whether the ICC were to desist from asserting its jurisdiction by pushing the Ugandan government to investigate and prosecute the atrocities in Acholi lands, or by allowing for restorative justice rituals to take place in addition to criminal justice, by qualifying and judging the atrocities that took place as a matter of criminal justice, the ICC's response is an act of collective self-recognition by the international community which recognizes the other, the Acholi, *as one of us**, while also misrecognizing the Acholi because they demand to be viewed as *other than us**.

The asymmetries at work in struggles for recognition preclude that human plurality can or could come to be contained within the unity of any given legal order.

VII. GLOBAL JUSTICE AND RESTRAINED COLLECTIVE SELF-ASSERTION

Interpreting justice, global or otherwise, in terms of reciprocal recognition runs the risk of *assimilating* the other, who becomes no more than one of us*. The counterpart to the injustice of "othering" is the injustice of "selving." Theories of reciprocal recognition take for granted that demands for recognition can in principle, even if not always in fact, be sorted out within a single legal order by redefining the order's unity in a way which fully accommodates human plurality. In a word: justice as reciprocal justice presupposes that a legal order is possible in which everyone could be fully emplaced: to each their own place. By contrast, justice as asymmetrical recognition acknowledges

the irreducible ambiguity of recognition, which is always also misrecognition.[52] This ambiguity is by no means a call to resignation. For asymmetrical recognition is that form of responsiveness to demands for recognition in which the other (in ourselves) is recognized as one of us* *and* as other than us*.

What, concretely, does this mean in the case of the Acholi? And in what way might asymmetrical recognition offer a template to understand what is at stake in global justice more generally?

In addressing these urgent questions, I take my cue from Carl Schmitt's notion of the exception (*Ausnahme*), albeit to give this notion an anti-Schmittian twist. In a well-known work, Schmitt takes issue with the truism according to which the exception confirms the rule. He shows compellingly that the exception, in its proper and strong sense, does not confirm the rule because it "cannot be subsumed [in a rule]; [it is a form of behavior that] defies the general codification."[53] The expression "what cannot be subsumed" is a pallid translation of the German original: *was sich entzieht*, which connotes what defies, eludes, and exceeds a rule. The exception is the *strange* which resists accommodation in how a legal order draws the distinction between the legal and the illegal; the a-legal. But whereas for Schmitt the irruption of an exception into a legal order is a clarion call for an individualized measure (*Maßnahme*) that would destroy the strange with a view to a ensuring a collective's continued existence, I submit that the strange is not necessarily the domain of enmity, even though there are forms of strangeness which manifest themselves in the guise of the enemy. Most fundamentally, the exception resists inclusion because it is the other (in ourselves) that is strange to us*. When confronted with an exception, a collective can exercise *restraint* when asserting its continued existence, suspending the application of rules that are in principle applicable to the case at hand. In this way, a collective engages in an act of indirect recognition, a form of recognition that holds back to hold out insofar as we* cannot include the other (in ourselves) as one of us without destroying the other's strangeness. To suspend the application of the rule, to let the law remain silent rather than to speak it (*jurisdictio*), is to protect the dimension of strangeness in the other that resists accommodation in what we* call our own. Asymmetrical recognition amounts to restrained collective self-assertion.[54]

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52. A view I share with THOMAS BEDORF, VERKENNENDE ANERKENNUNG: ÜBER IDENTITÄT UND POLITIK (2010) and ALEXANDER GARCÍA DÜTTMANN, BETWEEN CULTURES: TENSIONS IN THE STRUGGLE FOR RECOGNITION (Kenneth B. Woodgate trans., 2000).

53. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 13 (George Schwab trans., Mass. Inst. Tech. 2d prtg. 1988) (1922).

54. For a fuller development of this notion see LINDAHL *supra* note 14, at 248–254.

I am not pleading, however, either for collective self-assertion *tout court*, in which case recognition is no more than recognition of the other (in ourselves) as one of us*, or simply for a collective self-restraint that would treat the other (in ourselves) simply as other than us*; asymmetrical recognition conjoins collective self-assertion and restraint. Why? Because suspending the application of the law to the other as strange cannot go so far as to become an act that betrays who we* are as a collective. We* must be able to continue asserting what we* deem to be our collective identity when suspending the application of our legal order to preserve the other as strange. Were we* not able to do so, our preservation of the other as strange would amount to a form of collective self-betrayal, the denial of who we* are as a collective.

What, concretely, does restrained collective self-assertion mean for the Acholi and other comparable cases of resistance to the Rome Statute? Qua *restrained* collective self-assertion, it means that the ICC should have considered the possibility of not asserting its jurisdiction over the atrocities perpetrated in Acholi lands. More precisely, it should have considered suspending the application of the principle of complementarity and making room for the Acholis to settle the atrocities through restorative justice. By dismissing straightaway and without any serious consideration the Elders' plea for restorative justice, qualifying it as a form of local and traditional justice, the ICC, by way of its Prosecutor, committed an injustice, assimilating the other to one of us*. Qua restrained *collective self-assertion*, an assessment of whether complementarity should be suspended would have required a careful contextual judgment, in dialogue with the Elders and others, about whether restorative justice would be able, citing Drumbl anew, to deal with the "complexities of reintegration in situations of mass atrocity." To hold back from asserting the ICC's jurisdiction, if restorative justice were incapable or insufficient to deal with these complexities, would amount to betraying the Court's mandate to "guarantee lasting respect for and the enforcement of international justice," as per the final Consideration of the Preamble to the Rome Statute.

Against a universalist reading of the Statute that would collapse global justice into criminal justice, I interpret the final Consideration of the Preamble as implicitly conceding that criminal justice does not exhaust international justice, hence that under certain conditions the ICC may be called upon to suspend complementarity and the dominion of criminal justice to create the conditions for global justice. I am in Drumbl's good company when he argues for "qualified deference" to national or local institutions in dealing with mass atrocities:

> Qualified deference does not involve a blind retreat to national or local institutions. Such . . . retreat would be problematic. In some postconflict societies, juridical institutions are devastated, illegitimate, corrupt, manipulable, complicit in violence, or in the service of repressive social control . . . . Complementarity, however, is too controlling . . . . Qualified deference . . . creates a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their process and liberal criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure.[55]

I take Drumbl's defense of qualified deference to be a particularly apposite illustration of asymmetrical recognition as the heart of restrained collective self-assertion, regardless of the specific interpretative guidelines he proposes for applying the principle of qualified deference to cases of mass atrocity.

More generally, it seems to me that restrained collective self-assertion offers a template to understand what is at stake in global justice. The reader will remember that I began this article by asking about the globality of global law and global justice. At first glance, the answer is as obvious as it is perspicuous: it speaks to a law and a justice which have an inside but no outside; a law and a justice that hold unequivocally and unconditionally for all of humankind and everywhere. The main thrust of this article has been to show that while not all legal orders have borders, all legal orders, global or otherwise, have limits, an outside which appears through xenotopic behavior. Succinctly, because the representation of the human community through a legal order represents humanity as this rather than as that, the emergence of a global legal order folds non-identity, a difference, into collective identity, giving rise to others—potentially to strange others—in ourselves who can contest their inclusion in the legal order we* call our common humanity: Not in our name! Because the unity of humanity is a represented unity, no legal order can include humanity without also excluding it. No legal order can claim global validity for itself unless it is somewhere rather than everywhere. Global law is local law; so also the Rome Statute.

But if legal orders aspire to realize justice, does this then mean that global justice is perforce local justice? Yes and no. Yes, insofar as global legal orders cannot but aspire to render to each their own place within the limited arrangement of places to which they give rise. Such is the tenor of collective self-assertion. No, insofar as those who claim to represent humanity acknowledge, through their self-restraint, that

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55. DRUMBL, *supra* note 36, at 188.

justice is never only to be rendered here, in the borderless but limited global legal order we* call our own, but also elsewhere.